BOOK REVIEWS

THE LAW OF CONTRACTS. Samuel Williston, Weld Professor of Law in Harvard University. New York, Baker, Voorhis & Co., 1920. In four volumes. Vol. I, pp. xxiii, 1155, Vol. II, pp. xxi, 1157-2329.

Considered from almost any angle this is easily the best treatise on the law of contracts in our language.

Two outstanding features of the book are defended in the preface. "Included within it are large portions of what is contained in works on Vendor and Purchaser, Sales of Personal Property, Negotiable Instruments, Agency, Bailments, Carriers, Landlord and Tenant, Insurance, Suretyship, Equity, Master and Servant, Quasi-contract, Damages, Evidence. * * * The law of contracts * * * after starting with some degree of unity now tends to fall apart. * * * It therefore seems desirable to treat the subject of contracts as a whole, and to show the wide range of application of its principles." This is a good text, but herein is not the proper place for a homily on the rarely other than accidental hyper-departmentalization of our legal thinking. Many will regret that Professor Williston did not keep his work within the limits of greater convenience in view of the number of other excellent treatises on the collateral subjects mentioned but all will recognize that he was confronted with the necessity of choosing between two (under our present classification) necessary evils, whatever may be thought of the wisdom of the choice which he has made.

The second aspect of the work defended in its preface is the amount of space devoted to legal analysis and criticism. This needs no defense. It, to the contrary, is the most valuable feature of the work—its principal and wholly sufficient justification. Eliminate it and the book would approximate the encyclopaediac vintage of which we suffer from no serious shortage. Here is a text-book at once comprehensive and critical to a degree not infrequently attempted but rarely attained.

The author has adhered to familiar terminology in stating the results of his analysis of the cases. Of this something has been,[1] much may be, and more will be, said. But two observations will be indulged in here. It is believed that the value of the book would have been added to if, by a judicious use of a more incisive terminology, sharper distinctions had been made in questions involving the difference between evidential as opposed to operative facts and between facts as opposed to their legal consequences. So also in situations where rights and powers need differentiating and factoring. However, the author might have gone to the opposite and more unfortunate extreme. He might have so busied himself in merely translating familiar notions into a novel terminology as to have had left neither time nor energy

[1] See review by Professor Walter Wheeler Cook, 20 COLUM. L. REV. 716, and by Professor Arthur L. Corbin, 29 YALE L. JR. 942.

for analysis. He has analyzed whatever may be thought of his analysis. In hunting for a better platter to bring it on, he did not forget to cook the goose.

This treatise contains the author's third statement of his views on consideration.[2] Few legal topics have been discussed so carefully by so many writers with such a multitude of conflicting conclusions. Professor Williston's final position viewed as a whole contains more good sense as to the actual results reached by the cases than does that of any prior writer. But the end is not yet. Discussion will follow discussion. Many will despair and some will suggest emancipation by abolition, thereby attaining the sublime in naïvete. It may be, too, that some one sometime will content himself with the prosy task of preparing a really complete list of the many distinct senses in which the *word* "consideration" is used by courts and academic writers whence by a bare possibility it may appear that most of the discussions of the *doctrine* of consideration hitherto had are comparable to an attempt to solve some simultaneous quadratics with the value of X therein subject to like change without notice.

In this work, too, is to be found the most careful and accurate marshaling of the decisions on contracts for the benefit of third persons. It would not have been surprising had Professor Williston's objections on principle to the results reached by the American cases abated somewhat since his earlier discussion of this subject.[3] Other subjects treated in Volume I are formal contracts, capacity of parties, joint contracts, assignment and the Statute of Frauds.

The first half of Volume II is devoted to general principles of contract. With the second half begins the discussion of special kinds of contracts mentioned in the preface, at which point interest recedes, again to mount when, in later volumes, we shall get Professor Williston's ideas on such general subjects as impossibility, illegality and discharge. A noteworthy feature of the first part of Volume II is the author's treatment of so-called conditions implied in law in bilateral contracts. He prefers to find the logical basis for such conditions in the fact that, just as the promises were the agreed exchange each for the other when the contract was formed, so also the performance by each party is, in the contemplation of the parties, to be exchanged for the performance by the other party. § 813. It is to be noted that this theory rests upon what the contemplation of the parties was. In consequence it comes difficultly near to being the theory that so-called conditions implied in law are merely the courts' construction of the language used by the parties, a view which Professor Williston in the main rejects. § 813. Probably a proper use of the construction method of attacking these problems will take us farther in explaining the cases than is commonly supposed. Nevertheless, it is true that this theory will not account for all of them. We finally reach a point where we can no longer rely upon what the parties intended or contemplated because numerous situations evolve to which by no stretch of the imagination can it be said that the minds of the parties ever adverted and

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[2] 8 HARV. L. REV. 27; 27 HARV. L. REV. 503.

[3] 15 HARV. L. REV. 767.

hence, concerning which, they could not have had any intention or have indulged in any contemplation.

To this theory the author adds a defense of the use of the term, failure of consideration. He admits that the content of the word, consideration, used in this connection is not identical with that of its use in stating the law of the formation of contracts. The term in both connections, he states, expresses the common and general idea of "exchange" or "price." In like manner he sees accuracy in speaking of the consideration for a conveyance or other executed act. But he adds, "The requirements for legally sufficient consideration in one or the other case may differ, but that is another matter." Whence one of two things appear: (1) he is attempting to establish and defend one of the non-technical meanings of the word consideration, which is no concern of lawyers, and is asking us, already lost in the maze of this word, to attempt to define a new term, viz: "legally sufficient consideration," or (2) he has admitted the case against him.[8a] In this part of the law of contract he and we need a distinct term because we have here a distinct idea to express. It would seem better to adopt a new term rather than further to abuse that already prostituted word, "consideration." The author himself witnesses to its uncertain character by himself using appositive expressions in the same section in which he attempts to defend the use of the term, failure of consideration. § 814.

Now for more general matter. The publication of Professor Williston's work on the formation of contracts is epochal in the development of the law of simple contracts. The opening of the nineteenth century found the courts under the influence of a contemporary philosophy which laid undue stress on the will as a determinative in social relations. § 20. From this influence we inherited such notions as the necessity of a meeting of the minds and of an intent to contract for the formation of a contract. Then followed the development of the notion that it was unreasonable to allow the existence of contractual liability to turn at all on what the defendant thought at the time of the bargain if what he said and did reasonably indicated assent. Thus arose an insurgency against the earlier view and the attendant conflict characterized most of the latter part of the Nineteenth century. The crowning achievement of Professor Williston's work in this field is that his is the final and successful attack in the overthrow of this basic error with which we started. He has adopted what may be called the objective as opposed to the subjective test and has consistently applied it throughout his book. And it works. It accounts for the cases. It can now be taken as definitely settled that the facts operative to produce contractual liability are to be looked for not in what the defendant thought but in what he said and did, reasonably interpreted.

But what of the plaintiff? One gets the impression from reading Pro-

[8a] Other parts of the book seem to indicate that the author proposes the adoption of the term, "legally sufficient consideration." See § 101, for example. To admit that it is necessary to use such polynomials is to admit that the subject has no terminology of its own, or, at best, a very clumsy one, because there are equally cogent reasons for adding "legally sufficient" to the terms, offer, acceptance, and the score or more of other technical terms found in contract law.

fessor Williston's discussion that he has, consciously or unconsciously, adopted the objective test both in the case of a person seeking to escape contractual duties and liabilities and in the case of a person seeking to assert contractual duties and to exercise contractual powers. But these are distinct cases. Now we may find ultimately that the test is objective in both, but that cannot be assumed. Certainly there is nothing in the nature of things making that a necessary result. It may be true but we must not in our enthusiasm for the objective theory allow ourselves to be swept to an opposite extreme of error. Who knows? It may be that the old subjective theory is yet a half truth, wherefore its puzzling vitality. We may find that one cannot assert rights and powers unless he was actually, as well as reasonably, led to expect the performance for which he sues, that upon such expectation he subjectively relied at the time the alleged bargain was made.

A in jest makes an offer of a bilateral contract to B. B reasonably thinking A is serious accepts the offer. A sues B. A telegraph company raises the price named in an offer of bilateral contract of sale. The offeree-vendee accepts in ignorance of the error. The offeror-vendor learning of the mistake decides to hold the offeree to the higher figure. That B can hold A in the first case and that in the second case the offeree can hold the offeror where the error is in the opposite direction are applications of the thesis which makes Professor Williston's work monumental. But his work does not make a beginning toward the solution of the problem involved in the cases as stated. Is the test objective or subjective as to the person seeking to assert rights? That question is still ahead of us.

Now suppose a promise offered for an act. The act is done but not done in reliance upon the offer. Nevertheless it is so done that to onlookers, the offeror among them, it is apparently done in reliance upon the offer. May the offeree hold the offeror? No assertion is now made that the test is not objective. It may be that it is and that the offeror is liable, but it is unscientific to assume so. The most ardent protagonists of the objective theory and the greatest admirers of Professor Williston's championship of it cannot read his attempt to apply it to this situation and wholly escape a feeling that the effort is labored to say the least. § 67. It is commonly said that the act asked for by the promisor must be done by the actor in reliance upon the offer. Is it not possible that that means that the act must be caused by the offer? If so, how can action be caused except by an antecedent state of mind induced in the actor and that, too, an actual, real, or subjective state of mind, not an apparent one?

Back to bilateral contracts. Another pure abstraction kindred to the one just discussed which descended upon us from the introspecionists of the early Nineteenth century is that off yonder somewhere in space is a thing called a bilateral contract which, if it exists at all, automatically binds both parties or binds neither; that the group of facts operative to bind one party is, in some mysterious way, inherently and necessarily identical with the group of facts operative to bind the other party. Now it may be that men do live and move in the body of such an all-pervading and mysterious principle and it may be that they do not. Professor Williston says, § 92, "Nothing is more

fundamental than that in bilateral contracts both parties must be bound or neither * * *." That may be so but the assertion is ventured that, at this stage in our investigations, the proposition as stated is a pure assumption and it is unfortunately made because, if accepted, further inquiry ceases. Nothing so fundamental can be assumed. The cases must be examined. If we recall that in our law parties to a contract do not litigate their relations each to the other simultaneously, we should not be surprised to find what is the fact, viz., the decisions do not make this a closed issue regardless of the generalities indulged in by the courts and text-writers. A single line of inquiry is suggested. Dividing a normal or usual acceptance into its factual elements we have: (a) a state of mind of assent. (b) an external act, (c) expressive of that state of mind, (d) of such a character as to come to the knowledge of the offeror. Advancing from a to d, what is the minimum necessary to render the transaction legally operative if (1) the offeree is suing the offeror, (2) if the parties to the action are reversed?[4] May the offeree vary from the offer as to (b), (c), and (d) according as he is suing or is being sued?[5]

No attempt has been made here to give even a partial catalogue of the cases in which it is material to determine (1) whether the test is objective as to both parties and (2) whether in bilateral contracts the groups of facts operative to bind the two parties are identical. No answers to these two questions are proposed. They are merely raised with a protest against assuming their answers.

Law students and the legal profession are deeply indebted to Professor Williston for his giving them the results of his long and careful investigations. His work abounds in sane and well-matured conclusions richly rewarding his great industry, patience and thoroughness.

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TIFFANY ON REAL PROPERTY (three volumes), by Herbert Thorndyke Tiffany, of Baltimore, Maryland. Chicago, 1920. Callaghan & Company. Pp. xxxii, 3666.

The ordinary textbook in law which is really only a statement of the result of the cases is theoretically easy to write. The industry and patience to examine a large number of cases and the ability to use understandable English are the necessary qualities. There are, however, all too many of these ordinary textbooks. Only occasionally do we find a writer rising noticeably above the disappointingly common mediocrity. There are too few Wigmores, Willistons, and Salmonds.

The writer of the noteworthy text must, of course, have the qualities mentioned—industry and ability to write,—but he must have something more. The ordinary writer can tell what the cases decided, the unusual writer does

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[4] The author's criticism of Hallock v. Commercial Insurance, 26 N. J. L. 268, for example, does not consider the fact that in that case the offeror was suing the offeree.

[5] See for example Wheeler v. Klaholt, 178 Mass. 141.